



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 16 OF 2018

(Formerly ELC No. 207 of 2017)

CATHERINE KIGASIA KIVAL.....PLAINTIFF

VERSUS

ERNEST OGESI KIVAL.....1ST DEFENDANT

PAMELA NJOKI KARANJA t/a PINQ AGENCIES.....2ND DEFENDANT

CAROLYNE EGOKI WEKOTO t/a KAROLS

INTERIOR DECORATIONS.....3RD DEFENDANT

SAMUELBUGUA t/a KAROLS

INETRIOR DECORATPORS.....4TH DEFENDANT

THE CO-OPERATIVE BANK OF KENYA LIMITED.....5TH DEFENDANT

GEORGE NJOROGE MUIRURI t/a LEAKEY'S AUCTIONEERS....6TH DEFENDANT

RULING

1. The suit herein is for declarations and injunctions with regard to a property known as Kakamega/Logovo/1918, registered in the name of the 1st defendant and given out as collateral to secure a loan given by 5th defendant to 2nd, 3rd and 4th defendants, and which the 6th defendant had sought to sell to realize the security upon default. The suit is brought at the instance of the plaintiff, a spouse of the 1st defendant, on grounds that the property had been offered as security without her consent, which was a necessary requirement on grounds that she had a spousal interest in it, and that she had in fact contributed to its acquisition, therefore making it matrimonial property.

2. I have closely perused through the file of papers before me. I have seen only one defence statement, dated 5th September 2017 and filed by the 3rd and 4th defendants. The said defendants deny any knowledge of the plaintiff, and describe her as a stranger to them. They assert that the 2nd defendant was the only known spouse of the plaintiff.

3. What I am called upon to determine is a Motion dated 21st June 2017, which was filed herein simultaneously with the plaint of even date. The Motion, in the main, seeks orders to restrain disposal of the suit property pending hearing and determination of the main suit. The plaintiff has attached, to her affidavit in support of the application, a marriage certificate as proof that she was a spouse of the 1st defendant at the material time when the financial transaction was entered into where the subject property was offered as security.

4. There are two responses to the application. One by the 3rd and 4th defendants and the other by the 5th and 6th defendants. The response by the 3rd and 4th defendants is by an affidavit that the 3rd defendant swore on 5th September 2017. In it she makes the same allegations as those made by the two defendants in their defence: that the plaintiff was a stranger to them and that the 2nd defendant was the only wife of the 1st defendant. They support the application to the limited extent of being allowed time to claim from the 2nd defendant so as to allow them pay the loan advanced to them by the 5th defendant as agreed between them and the 2nd defendant in a meeting that had been held with the 5th defendant. They state that the application be allowed with costs in their favour for that reason. The deponent has attached to that affidavit

minutes of a meeting purportedly held on 23rd August 2014 between the 2nd and 4th defendants and other individuals who are not party to these proceedings.

5. The response by the 5th and 6th defendants is through an affidavit that was sworn by Sarah Too, an employee of the 5th defendant. The position taken is that the bank extended credit to the 2nd defendant on basis of collateral that was offered by the 1st defendant. There is a spousal consent obtained from the 2nd defendant, and evidence that the property was registered in the sole name of the 1st defendant. They assert that they did due diligence, and that the property was not matrimonial property to the extent that the premises on it were commercial and did not comprise of residential premises, and, in any event, there was no evidence that the plaintiff contributed to its acquisition. Attached to that affidavit are documents relating to that impugned transaction.

6. Directions on the disposal of the application were taken on 10th October 2017 by consent, to the effect that the application be disposed of by way of written submissions. There has been compliance for the plaintiff and the 3rd, 4th, 5th and 6th defendants filed written submissions. I have perused through the same and noted the arguments made therein.

7. The only issue for me to determine is whether or not an injunction should issue to restrain sale of the suit property pending the hearing of the main suit. The argument by the plaintiff in the main suit is that the suit property was matrimonial to the extent that the plaintiff was married to the proprietor of that property and that she had contributed to its acquisition. The plaintiff has attached to her papers a marriage certificate, which is *prima facie* evidence that she was married to the 1st defendant.

8. The 1st defendant, the supposed husband of the plaintiff, did not enter appearance nor file defence, or even a response to the Motion. He has, therefore, not controverted the allegation by the plaintiff that she was his spouse, and that the suit property was matrimonial property. The only defence on record is by the 3rd and 4th defendants. They describe the plaintiff as a stranger to them, and assert that the only wife of the 1st defendant that they knew was the 2nd defendant. However, it should not be for the 3rd and 4th defendants to speak for the 1st defendant. Whether the plaintiff was a statutory wife of the 1st defendant was a matter that could only be addressed authoritatively by the 1st defendant. The fact that he chose not to respond to the matter should be telling. The 5th and 6th defendants have also not filed a defence. Their response to the Motion appears to suggest that the only spouse of the 1st defendant that they were aware of was the 2nd defendant, who signed the relevant consent papers. However, the fact that they were unaware of the existence of the plaintiff as the statutory wife of the 1st defendant could not take away from the validity of the statutory marriage.

9. The *prima facie* evidence that the plaintiff was the statutory wife of the 1st defendant would mean that she would be entitled to certain rights over the property of the 1st defendant in terms of the Land Registration Act 2012, No. 3 of 2012, the Land Act, No. 6 of 2012, and the Matrimonial Property Act, No. 49 of 2013, subject, of course, to such limitations as are set out in the said statutes. The enquiry as to whether the property in question was matrimonial or that the plaintiff had contributed to its acquisition are matters beyond the scope of determination at this stage, since they are core issues for determination at the hearing of the main suit.

10. The 5th and 6th defendants argue that the plaintiff had not established that the property was matrimonial by way of evidence of her contribution. They also argue that the property was commercial and that there was no matrimonial home on it. I would like to reiterate what I have stated above in paragraph 9. Whether the property was matrimonial or had been acquired by the joint efforts of the plaintiff and the 1st defendant is a matter for determination at the main hearing, and not at this interlocutory stage. I cannot make determinations in that regard without embarrassing the Judge who will ultimately have to hear and dispose of the main suit. I am mindful of the fact that the 5th and 6th defendants have not filed any defence to the plaintiff's plaint, and, therefore, the allegations made in the plaint are not controverted by them. Secondly, they have averred in their response to the Motion that a spousal consent was obtained from the 2nd defendant to have the suit property offered as collateral. That, in view, appears to contradict their argument that the property was not matrimonial, for if it was not why did they find it necessary to obtain the spousal consent of the 1st defendant's wife that they knew.

11. Overall, I am persuaded that there is need to preserve the subject of the suit pending determination of the issues that the plaintiff has raised in her suit. That is especially so because the 5th and 6th defendants have not found it necessary to controvert the plaintiff's claims by filing a defence. I shall accordingly grant the Motion dated 21st June 2017 in terms of prayer 4 thereof. Costs shall be in the cause. A date for mention for the purpose of pre-trial conference shall be assigned at the delivery of this ruling. Any party aggrieved by the orders made herein has the liberty to move the Court of Appeal appropriately within twenty-eight (28) days of this decision. It is so ordered.

DATED, SIGNED and DELIVERED in OPEN COURT at KAKAMEGA this 9th DAY OF October , 2019

W. MUSYOKA

JUDGE